# Yong Kon Fatt & Anor v Hock Seng Construction Sdn Bhd & Anor

HIGH COURT (IPOH) — CIVIL SUIT NO 22–151 OF 1994
CLEMENT SKINNER JC
14 DECEMBER 1999

***Civil Procedure*** *— Damages — Exemplary damages — Breach of sale and purchase agreement — Claim not founded in tort — Whether exemplary damages can be awarded for breach of contract*

***Civil Procedure*** *— Specific performance — Agreement for sale of house — Assignment of rights under agreement to second plaintiff, whether only second plaintiff can sue — Claim not heralded by expression 'specific performance', whether facts in statement of claim sufficient to secure relief for delivery of possession — Plaintiff in position to register as owner of property, whether necessary to make claim for transfer of property — Whether exemplary damages available in cases of breach of contract*

A sale and purchase agreement was entered into between the first defendant as vendor, the second defendant as proprietor and the first plaintiff as purchaser whereby the first defendant agreed to sell to the first plaintiff a double storey shophouse ('the property'). Subsequently by a deed of assignment, the first plaintiff assigned his rights, title and interest in the property to the second plaintiff. When the property was completed, the first defendant refused to deliver vacant possession of the property to the plaintiffs. The plaintiffs brought these proceedings requesting the defendants to deliver vacant possession of the property and claiming agreed and liquidated damages for late delivery. The plaintiffs submitted that they should be allowed to set off the amount claimed from the balance of the purchase price. In addition to liquidated damages, the plaintiffs also requested for exemplary damages. The defendants raised the following issues: (i) which of the plaintiffs had the right to sue in view of the assignment. The defendants contended that there has been an absolute assignment by the first plaintiff of his rights under the sale and purchase agreement to the second plaintiff and thus the rightful plaintiff was the second plaintiff; (ii) whether a claim was disclosed against the second defendant. It was submitted that the second defendant may have been the landowner but it was not the vendor of the property. In so far as compliance with the terms of the sale and purchase agreement was concerned, it was submitted that by delivering the title deed and memorandum of transfer to the first defendant whose obligation was to hand them over to the correct purchaser, the second defendant had fulfilled its obligations. As such there was no case disclosed against the second defendant; and (iii) there had been no tender of the balance of the purchase price by the plaintiffs to entitle them to request performance from the defendants. Even if there had been a valid tender, the plaintiffs were not entitled to any remedy as they had not prayed for specific performance of the agreement.

**Held**:

(1) The deed of assignment made it clear that the assignment by the first plaintiff of his right under the sale and purchase agreement was not an absolute one but conditional upon the events stated therein which have not come to pass yet. There was no merit in the submission of the defendants that it was only the second plaintiff who was the proper plaintiff (see p 564A–B).

(2) Based on the evidence, a case had been more than made out against the second defendant. In fact, the second defendant did not deny the allegation of breach contained in the statement of claim. In not having done so, they must be taken to have admitted such breach (see p 565H).

(3) The defence did not contain any averment raising the plea that there had not been a valid tender of the balance of the purchase price. It is a fundamental principal that a party is bound by its pleading. Giving effect to that principle, it was not open to the defendants to avail themselves to this defence or to raise any submissions or argument on it. In any event, the submission of no valid tender of the balance of the purchase price was untenable in the circumstances of the case (see p 566C–D, G).

(4) It would not be fatal to the plaintiffs' claim that it was not heralded by the expression 'specific performance'. What is required is that the party claiming the relief, firstly, identifies for the court what it is that he requires the other party to do so as to put him in a position relative to the other which the contract contemplates and, secondly, he sets out in his pleadings the facts that entitle him to such relief. The pleadings in this case showed that the plaintiffs had done both. On the particular facts of this case, the plaintiffs' prayer for delivery of possession being supported by facts pleaded in the statement of claim was sufficient to secure for the plaintiffs the relief they sought (see p 569A–B, D–E).

(5) The defendants' submission that the plaintiffs could not claim possession without first praying for a transfer of the property had no merit because it ignored the fact that the plaintiffs were already in a position to put themselves on the register as owner, being in possession of the title deed and duly executed memorandum of transfer to the property and therefore it was not necessary for them to pray for a transfer (see p 569E–F).

(6) The court was satisfied that the plaintiffs had on a balance of probabilities proved their claim against the defendants and that the plaintiffs were entitled to an order that the defendants do deliver vacant possession of the property to the plaintiffs (see p 570F).

(7) The first plaintiff's right to liquidated damages was a cross-claim which arose out of the same transaction as the first defendant's right to be paid the balance of the purchase price and was so closely connected with it that it would be manifestly unjust if the court were to order that the first plaintiff should pay over to the first defendant the balance of the purchase price without taking into account the amount of liquidated damages due to the first plaintiff (see p 572C–D).

(8) A decision on whether or not exemplary damages should be awarded to the plaintiffs would not turn on whether the plaintiffs had expressly pleaded it or not, rather it would turn on whether exemplary damages were available in a case pleaded in contract only where there was no allegation that the defendants had committed a tort against the plaintiffs. Exemplary damages have been awarded in cases founded in tort. It has not been awarded for breach of contract. The first plaintiff's claim was pleaded in contract and in essence the relief he sought was the specific performance of that agreement with an additional claim for damages for breach of that agreement. It was not a claim founded in tort and the plaintiffs in claiming exemplary damages had not alleged any tortious act committed against the plaintiffs. In not having done so, it was doubtful that punitive or exemplary damages could be properly awarded in this case (see pp 573C, 574B–C).

**[Bahasa Malaysia summary**

Suatu perjanjian jual beli telah dimasuki antara defendan pertama sebagai penjual, defendan kedua sebagai tuan punya tanah dan plaintif pertama sebagai pembeli di mana defendan pertama bersetuju untuk menjual kepada plaintif pertama suatu rumah kedai dua tingkat (hartanah tersebut'). Kemudian melalui suatu perjanjian serahhak, plaintif pertama telah menyerahhak haknya, hak milik dan kepentingan di dalam hartanah tersebut kepada plaintif kedua. Apabila hartanah tersebut telah disiapkan, defendan pertama enggan memberikan hak milik kosong hartanah tersebut kepada plaintif-plaintif. Plaintif-plaintif telah membawa prosiding-prosiding ini untuk meminta defendan-defendan menyerahkan milikan kosong hartanah tersebut dan menuntut ganti rugi yang dipersetujui dan juga ganti rugi jumlah tertentu untuk serahan lewat. Plaintif-plaintif telah berhujah bahawa mereka sepatutnya dibenarkan untuk menolak jumlah yang dituntut daripada baki harga belian. Selain daripada ganti rugi tertentu, plaintif-plaintif juga meminta ganti rugi teladan. Defendan-defendan telah membangkitkan isu-isu berikut: (i) siapa antara plaintif-plaintif mempunyai hak untuk mendakwa memandangkan serahhak tersebut. Defendan-defendan menegaskan bahawa terdapat

serahan mutlak oleh plaintif pertama akan haknya di bawah perjanjian jual beli kepada plaintif kedua dan dengan itu plaintif yang sepatutnya adalah plaintif kedua; (ii) sama ada suatu tuntutan telah dibuktikan terhadap defendan kedua. Adalah dihujahkan bahawa walaupun defendan kedua adalah tuan punya tanah tersebut tetapi beliau bukanlah penjual hartanah tersebut. Setakat pematuhan terma-terma perjanjian jual beli berkenaan, adalah dihujahkan bahawa dengan menyerahkan surat cara hak milik dan memorandum pindahmilik kepada defendan pertama yang mempunyai tanggungjawab untuk menyerahkan kepada pembeli yang sebenar, defendan kedua telah menunaikan tanggungjawabnya. Oleh itu, tiada kes yang dibuktikan terhadap defendan kedua; dan (iii) tiada pemberian baki harga belian oleh plaintif-plaintif untuk memberikan hak kepada mereka untuk meminta pelaksanaan daripada defendan-defendan. Walau sekalipun terdapat tender yang sah, plaintif-plaintif tidak berhak kepada sebarang remedi kerana mereka tidak memohon untuk pelaksanaan spesifik perjanjian tersebut.

**Diputuskan**:

(1) Surat cara serahhak adalah jelas bahawa serahhak oleh plaintif pertama akan haknya di bawah perjanjian jual beli perjanjian tersebut bukanlah mutlak tetapi bersyarat di atas perkara yang dinyatakan di dalamnya di mana ia belum dipenuhi lagi. Tiada merit di dalam hujahan defendan-defendan bahawa hanyalah plaintif kedua yang merupakan plaintif yang sewajarnya (lihat ms 564A–B).

(2) Berdasarkan keterangan, suatu kes yang kukuh telah diperlihatkan terhadap defendan kedua. Hakikatnya defendan kedua tidak menafikan pengataan pelanggaran tersebut yang terkandung di dalam pernyataan tuntutan. Oleh kerana tidak berbuat demikian, mereka mesti dikira telah mengaku pelanggaran tersebut (lihat ms 565H).

(3) Pembelaan tersebut tidak mengandungi sebarang penegasan yang membangkitkan hujahan bahawa tiada tender yang sah baki harga belian. Adalah suatu prinsip asas bahawa suatu pihak adalah tertakluk kepada plidingnya. Dengan memberikan kesan kepada prinsip tersebut, adalah tidak terbuka kepada defendan-defendan untuk membangkitkan pembelaan ini atau untuk membangkitkan sebarang hujahan berdasarkannya. Walau apa sekalipun, hujahan bahawa tiada tender yang sah baki harga belian tidak boleh diterima di dalam keadaan-keadaan kes (lihat ms 566C–D, G).

(4) Adalah tidak akan memudaratkan tuntutan plaintif bahawa ia tidak dinyatakan dalam ungkapan 'pelaksanaan spesifik'. Apa yang diperlukan ialah pihak tersebut yang menuntut relif tersebut, pertamanya menetapkan kepada mahkamah apa yang dia

perlukan pihak yang lain untuk membuat agar untuk meletakkannya di dalam kedudukan relatif kepada yang lain di mana kontrak memperuntukkannya dan, kedua, beliau menyatakan di dalam pliding-pliding fakta-fakta yang memberikannya hak untuk relif sedemikian. Pliding-pliding di dalam kes ini menunjukkan bahawa plaintif-plaintif telah melakukan kedua-duanya. Di atas fakta khusus kes ini, pemohonan plaintif untuk serahan milikan yang disokong oleh fakta-fakta yang diplidkan di dalam pernyataan tuntutan adalah mencukupi untuk memberikan plaintif-plaintif relif yang dipohon oleh mereka (lihat ms 569A–B, D–E).

(5) Hujahan defendan-defendan bahawa plaintif tidak boleh menuntut milikan tanpa memohon untuk suatu pemindahan hartanah terdahulu tiada merit kerana ia tidak mengendahkan fakta bahawa plaintif-plaintif telah pun berada di dalam kedudukan untuk meletakkan diri mereka dalam daftarai sebagai tuan punya, yang memiliki surat cara hak milik dan juga memorandum pemindahan hartanah yang telah dilaksanakan dan oleh itu ia adalah tidak perlu bagi mereka untuk memohon suatu pemindahan (lihat ms 569E–F).

(6) Mahkamah berpuas hati bahawa plaintif-plaintif telah di atas imbangan kebarangkalian membuktikan tuntutan mereka terhadap defendan-defendan dan plaintif-plaintif berhak untuk memohon perintah bahawa defendan-defendan memberikan milikan kosong hartanah tersebut kepada plaintif-plaintif (lihat ms 570F).

(7) Hak plaintif pertama untuk ganti rugi tertentu adalah suatu tuntutan balas yang berbangkit daripada transaksi yang sama oleh kerana hak defendan pertama untuk dibayar baki harga belian adalah terlalu bersangkutan dengannya sehinggakan ia adalah tidak adil jika mahkamah mengarahkan bahawa plaintif pertama membayar kepada defendan pertama baki harga belian tanpa mengambil kira jumlah ganti rugi tertentu yang perlu dibayar kepada plaintif pertama (lihat ms 572C–D).

(8) Suatu keputusan sama ada ganti rugi teladan patut diawardkan kepada plaintif-plaintif tidak akan bergantung sama ada plaintif telah memplid secara nyata atau tidak, sebaliknya ia akan bergantung kepada sama ada ganti rugi teladan adalah terbuka di dalam suatu kes yang hanya kontrak diplidkan di mana tiada pengataan bahawa defendan-defendan telah melakukan tort terhadap plaintif-plaintif. Ganti rugi teladan telah diawardkan di dalam kes-kes yang berdasarkan tort. Ia belum lagi diawardkan untuk pelanggaran kontrak. Tuntutan plaintif pertama adalah diplidkan di dalam kontrak dan secara ringkas relif yang dipohon olehnya adalah pelaksanaan spesifik perjanjian tersebut dengan tuntutan tambahan untuk ganti rugi bagi pelanggaran perjanjian

tersebut. Ia bukanlah tuntutan yang berdasarkan tort dan plaintif-plaintif di dalam menuntut ganti rugi teladan tidak mengatakan sebarang tindakan tort yang dilakukan terhadap plaintif-plaintif. Di dalam tidak berbuat demikian, ia adalah disangsikan bahawa ganti rugi teladan atau menghukum boleh diawardkan dengan wajarnya di dalam kes ini (lihat ms 573C, 574B–C).]

**Notes**

For a case on exemplary damages, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 1487.
For cases on specific performance generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4203–4246.

**Cases referred to**

*AB v South West Water Services* [1993] QB 507 (refd)
*Broome v Cassell & Co Ltd & Anor* [1972] AC 1027 (refd)
*Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287 (refd)
*Foong Chee Chong v Inspector Mohd Nasir bin Shamsuddin & Anor* [1998] 6 MLJ 421 (refd)
*Kredin Sdn Bhd v YTF Investments Sdn Bhd* [1998] 1 MLJ 46 (refd)
*Lim Kim Swee v Tan Meng San* [1960] MLJ 262 (refd)
*Rookes v Barnard* [1964] AC 1129 (refd)
*Rosita bte Amit v Tan Boon Seng* [1989] 3 MLJ 186 (refd)
*SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 (refd)

**Legislation referred to**

Rules of the High Court 1980 O 18 r 15(1)
Specific Relief Act 1950 s 11(2)

*Nga Hock Cheh* (*Kelvin Ding* with him) (*Nga Hock Cheh & Co*) for the plaintiffs.
*CK Leong* (*CK Leong & Co*) for the defendants.

*Cur Adv Vult*

**Clement Skinner JC**:

*Introduction*

This suit revolves around a dispute which has arisen over the purchase of a two storey shophouse in a development project known as Taman Sentosa, Sitiawan, Perak, the developer of which is a company called Hock Seng Construction Sdn Bhd ('the first defendant'). Taman Sentosa was

A developed on two parcels of land held under Titles Lot 16064 and Lot 16065 owned by a company called Kiat Poh Realty Sdn Bhd ('the second defendant'). The purchaser of the shophouse is one Yong Kon Fatt ('the first plaintiff') who subsequently by deed assigned his rights title and interest in the said property to a company called MG Marketing Sdn Bhd ('the second plaintiff'). The shophouse has been completed but the first B defendant has refused to deliver vacant possession thereof to the plaintiffs.

*The facts*

Set out below are the relevant facts as I have found them to be; they are C either not disputed; are indisputable; or where indicated, are accepted by me as proved.

On 15 August 1992, a tripartite agreement ('the sale and purchase agreement') was entered into between the first defendant as vendor, the second defendant as proprietor, and the first plaintiff as purchaser, whereby D the first defendant agreed to sell the first plaintiff a double storey link shophouse erected on HS(D) Dgs 3758 PT 16183, Mukim Sitiawan ('the property') for RM128,000 ('the purchase price').

The sale and purchase agreement contains various terms and conditions but for present purposes, it will only be necessary to mention a E few, namely:

Clause 2 thereof, which contains an undertaking by the first and second defendant that the said property shall be free from encumbrances immediately prior to the handing over of vacant possession of the said property to the first plaintiff;

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Clause 4(1) thereof, which provides that the purchase price was to be paid by instalments at the times prescribed in the third schedule to the agreement. Item 2 of the schedule stipulates that the first plaintiff's obligation to make such instalment payments only arises upon receipt of a written notice that a particular stage of development is completed;

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Clause 4(2) goes on to state that every notice referred to in the third schedule requesting for payment shall be supported by a certificate signed by the vendor's architect or engineer in charge of the housing development;

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Clause 20 thereof, wherein the first defendant covenanted to complete the shophouse and deliver vacant possession thereof to the first plaintiff within 24 calendar months from 15 August 1982, failing which the first defendant would pay immediately to the first plaintiff liquidated damages calculated from day to day at the rate of 10% per annum of the purchase price.

I

When the sale and purchase agreement was entered into on 15 August 1992, the parties thereto and the lawyer who prepared the agreement

namely Chen Hong Eng ('PW1'), were able to identify and describe the said property by its document of title, and by reference to a layout plan showing that title number which was attached to the agreement. However, for the circumstances in which the said property came to be selected for purchase, and how PW1 was able to describe in the sale and purchase agreement the actual shophouse being sold, it is necessary to refer to events that occurred some nine months earlier. The evidence on this aspect was given by both the first plaintiff and PW1, both of whose testimony, on the events about to be referred to, I accept as being unshaken in cross-examination, supported by contemporary documentary evidence identified in this judgement and as being consistent with the truth.

According to the first plaintiff, on or about 14 September 1991, he went to the offices of one Wang Su Sing ('Wang'). There is evidence given by DW2 Wang Ting Sing that Wang is a common director in both the first and second defendant and the person who attended to the purchase of the said property by the first plaintiff. At Wang's office, the first plaintiff was shown a layout plan of Taman Sentosa (p 1 of encl 56) ('the layout plan') which showed three blocks of shophouses. During the trial, the parties agreed to refer to these three blocks as Block A, B and C respectively. The first plaintiff testified that when Wang showed him the layout plan, each of the individual lots in Block A, B and C were already numbered from 1 to 45, with number 1 starting from the direction of Sitiawan to number 45 ending in the direction of Lumut. The first plaintiff then selected Lot 11 in Block A whereupon he made a payment of RM12,800 to Wang and was issued with two separate receipts (p 16 of encl 56). One receipt was issued by a company called Hock Keong Construction, acknowledging payment to it of RM5,000 as 'Contract sum 10% for Plot 11'; the other receipt was issued by the second defendant acknowledging payment to it of RM7,800 for 'land 10% for Plot No 11'.

Soon thereafter, the first plaintiff and Wang went to the office of a lady lawyer, PW1, where the first plaintiff instructed her to prepare a sale and purchase agreement for Lot 11. To enable PW1 to do so, Wang gave her a layout plan, now found at p 302 of encl 55, which showed the lots contained in Block A, B and C identified by numbers running from 1 to 45. The first plaintiff informed PW1 that he had selected Lot 11 in Block A counting from the direction of Sitiawan to Lumut.

PW1, on her part confirms in her evidence what is stated above regarding the layout plan being given to her by Wang and the first plaintiff informing her of his selection of Lot 11, counted from the direction of Sitiawan towards Lumut. PW1 testified that based on the above information, she prepared two agreements; one was an agreement whereby the second defendant would sell a plot of land approved for a shoplot to the first plaintiff ('the land sale agreement'), and the other an agreement between the first plaintiff and a company called Hock Keong Construction whereby the first plaintiff as 'beneficial' owner of a plot of land approved for a shoplot engaged Hock Keong to construct a shophouse thereon ('the

A building agreement'). What is relevant about these two agreements is that PW1 explained that when they were prepared and entered into on 19 September 1991, qualified title to the subdivided lots in Taman Sentosa were not issued yet. Therefore, according to PW1, in these two agreements, the description of the plot of land sold and upon which the shophouse was to be constructed was achieved by reference to the lot number stated in the B layout plan supplied by Wang. Both the land sale agreement and the building agreement refer to Lot 11, identified on the layout plan annexed to each agreement, as the plot sold to the first plaintiff.

PW1 further explained in cross-examination and re-examination, and I C accept her explanation, that it was intended and agreed by the parties that when the document of title was issued to Lot 11, another agreement to supersede the land sale agreement and building agreement would be entered into between the parties in accordance with Schedule G of the Housing Developers (Control and Licensing) Act 1966 and Regulations made thereunder, in which agreement, the issued document of title to D Lot 11 would be identified so that when the purchaser applies for a bank loan, there would be no problem to identify the property to be charged to the bank. According to PW1 this modus operandi of first entering into the two agreements followed by a Schedule G agreement was not confined to the transaction between the first plaintiff and defendants only but was E adopted for many other purchasers in Taman Sentosa and as an example she referred to those agreements found at pp 161, 166 and 173 of encl 55, the agreed bundle of documents.

Continuing with the narrative, by August 1992, the documents of title to the subdivided lots in Taman Sentosa must have been issued because on F 15 August 1992, the sale and purchase agreement which adopts the Schedule 'G' format was executed by the parties wherein the said property was identified no longer as Lot 11 but PT 16183. It is the evidence of PW1, and again I accept her evidence, that before she prepared the said sale and purchase agreement for execution, she was furnished with two documents by Wang who came to her office to deliver them; they were a copy of the G layout plan now found at p 15 of encl 55, and the title deed to PT 16183. Subsequently when the said sale and purchase agreement was sent to the defendants for execution, the particulars identifying the property sold had already been inserted in the agreement. PW1 also prepared the memorandum of transfer found at pp 309 to 312 of encl 55 which was H executed by the second defendant transferring the said property to the first plaintiff who has accepted such transfer on 19 August 1992. PW1 confirmed that all the particulars in the memorandum of transfer were filled in before it was sent to the second defendant for execution and that this memorandum of transfer has been duly adjudicated for stamp duty purposes. PW1 is quite certain in her testimony that even though the parties I had entered into the land sale agreement and building agreement first and later followed by the sale and purchase agreement, there was no change in the location of the property chosen by the first plaintiff.

The defendants did not lead any evidence from either of its two witnesses on this aspect of the case. The evidence of PW1 and the first plaintiff relating to the selection of the said property and the entering into of the sale and purchase agreement wherein the said property is properly identified therefore stood uncontradicted. That was another reason why I accepted their evidence.

In so far as payment of the purchase price for the said property is concerned, it will be recalled that upon selecting Lot 11, the first plaintiff paid RM12,800 to Wang for which the first plaintiff received two receipts. Thereafter, there is ample evidence to show that prior to the execution of the said sale and purchase agreement, the first plaintiff had on 1 August 1992 paid RM12,800 to the first defendant for which a receipt was issued acknowledging the amount as payment of '20% progress payment for PT 16183, Taman Sentosa, Mukim Sitiawan'. After the execution of the sale and purchase agreement, the first plaintiff made a further progress payment of RM12,800 on 15 September 1992 to the first defendant who issued a receipt acknowledging the sum was paid as '30% progress payment for PT 16183 Taman Sentosa, Mukim Sitiawan'. On the same date, the first plaintiff lodged a caveat against the said property to protect his interest therein. A further progress payment was made by the first plaintiff on 21 October 1992 to the first defendant, who issued a receipt acknowledging such payment as '45% progress payment for PT 16183, Taman Sentosa, Mukim Sitiawan.' All these receipts which are found at pp 314 and 315 of encl 55 were referred to the court by the first plaintiff. The above facts show that from the time of selection of the shophouse till payment of 45% of the purchase price therefore, there was no hint of any problems between the parties to the sale and purchase agreement and neither was there any indication that a mistake had been made regarding the property sold.

After paying 45% of the total purchase price by 21 October 1992, the first plaintiff did not receive any further demand from the first defendant for the payment of the balance of the purchase price and this situation continued for the next 19 months until 13 July 1994 when it was the first plaintiff who took steps to tender payment of the same to the first defendant on two occasions but without success. Before describing those attempts, this would be an appropriate place to describe what was happening to the said property in those 19 months.

PW3, Cik Hadzirah bt Mohd Nordin, the technical assistant at Majlis Daerah Manjung, testified that on 9 April 1993, the first defendant submitted amended building plans to construct an additional third floor to those shophouses constructed on PT 16184 to PT 16193 inclusive in Block A. Those PT's included PT 16183, ie the said property. According to PW3, the amended plans were approved on 24 December 1993. Some three months after the first defendant had submitted the amended building plans, the second defendant on 9 July 1993 entered into a lease agreement with a supermarket called Pasaraya Matahari Sdn Bhd ('Pasaraya Matahari') whereby 15 units of shophouses in Block A, including the said property,

were let out for a period of 15 years from the date of issuance of an occupation certificate for the said shophouses (pp 195 to 199 of encl 55). On 15 September 1993, a supplementary agreement was entered into between the same parties reducing the number of units leased from 15 to 10. The said property was one of the excluded units but Pasaraya Matahari was given a first option to lease PT 16183. Evidence in relation to the above dealings was elicited during the cross-examination of DW2.

PW1 testified that sometime after the sale and purchase agreement was entered into and at a very late stage in the transaction, Wang went to PW1's office to request her to ask the first plaintiff to change the lot he (first plaintiff) had bought to another lot but Wang did not give her any reason for this request and neither did Wang inform her that a mistake had been made in the shophouse sold to the first plaintiff. PW1 testified that she conveyed the request to the first plaintiff. The first plaintiff on his part testified that at the request of Wang he (the first plaintiff) met him (Wang) one evening at a night spot when Wang requested the first plaintiff to 'give back PT 16183' in exchange for another shophouse and RM20,000 in compensation. According to the first plaintiff, Wang wanted PT 16183 back so that he could build a third storey to it so that it could be rented out to a supermarket.

Instead of agreeing to Wang's suggestion, the first plaintiff took steps to tender the balance of the purchase price to the first defendant. It is the testimony of PW1 that when the said property was purchased by the first plaintiff, she had conducted a search at the land registry to ascertain whether there were any encumbrances against the same. The search revealed none. When the first plaintiff wanted to pay the balance of the purchase price, a second search was conducted which revealed that a caveat (the offending caveat) (later set aside in separate proceedings on 31 July 1999) had been lodged against the said property by a person claiming to be the purchaser of the said property. According to the first plaintiff, he instructed his present solicitors to tender payment of the balance of the purchase price to the first defendant. On 13 July 1994, Messrs Nga Hock Cheh & Co wrote to the first defendant's solicitors, Messrs Hong Chew King & Co forwarding a cheque for RM70,400 in payment of the balance of the purchase price and in return requesting the first defendant's solicitors for the following documents: a withdrawal of the offending caveat lodged against PT 16183 registered under Presentation No 1004/94 Jilid 912, Folio 14; the certificate of fitness for occupation in respect of the said property and all the keys to the said property (p 316 of encl 55). On the same day, the first defendant's solicitors returned the said cheque to the first plaintiff's solicitors on the grounds that they no longer acted for the first defendant in respect of the said land. One week later, on 20 July 1994 the first plaintiff's solicitors wrote direct to the first defendant informing them about the tender of the balance of the purchase price to Messrs Hong Chew King & Co but its return for the reasons already stated; that the balance of the purchase price had been deposited at Messrs Nga Hock Cheh & Co with instructions to release the same to the first defendant in exchange for a

withdrawal of the offending caveat lodged on the said property and all keys to the same and that the first defendant was accordingly requested to call at the first plaintiff's solicitors' office within seven days of the letter for the purposes abovementioned (p 317 of encl 55). The first defendant have not done so.

It is the first plaintiff's testimony that the first defendant refused to accept payment of the balance of the purchase price because Wang wanted him (first plaintiff) to give back the said property to the first defendant so that a third storey could be built to PT 16183 and then let out to Pasaraya Matahari. It should be noted that this testimony of the first plaintiff was not challenged when he was being cross-examined; instead questions were put to the first plaintiff to suggest that instead of PT 16183, a different shophouse identified as PT 16159 had been sold to him. This was firmly denied by the first plaintiff. I accept the testimony of the first plaintiff on why the first defendant refused to accept the payment of the balance of the purchase price in 1994; it is corroborated by those parts of the evidence of PW1, PW3 and DW2 which I have already set out earlier. I also accept the testimony of the first plaintiff on this point because as will be seen shortly, there was actually no mistake as to which shophouse had been sold to the first plaintiff.

For completeness, it should be mentioned here that even after this trial had commenced, the plaintiffs had through their solicitors Messrs Nga Hock Cheh & Co attempted by letter dated 30 April 1999 (p 10 of encl 55) to tender a cheque in payment of the balance of the purchase price to the first defendant's present solicitors Messrs CK Leong & Co but the latter have by letter dated 3 May 1999 returned the payment for the reason that they have no instructions to accept payment.

*The contentions*

It is the contention of the plaintiffs that they have at all material times been ready and willing to perform their obligations under the sale and purchase agreement including payment of the balance of the purchase price but that in breach of their obligations under the same, the defendants have failed to deliver vacant possession of the said property. The plaintiffs have accordingly brought these proceedings to request that the defendants do deliver vacant possession of the said property. The plaintiffs also claim damages and during the trial the first plaintiff give evidence that under the terms of the sale and purchase agreement, the defendants are obliged to pay an agreed liquidated damages at the rate of RM35.06 a day after 14 August 1994 when vacant possession was to be delivered. As at 22 April 1999, the amount payable by the defendants amounted to RM60,072.32. The plaintiffs say they should be allowed to set-off this sum from the balance of the purchase price. In addition to liquidated damages, counsel for the plaintiffs in submissions requested for exemplary damages to be awarded against the defendants.

A The defendants have refused to deliver vacant possession of the said property and in their amended defence say why. In a nutshell the defence is:

(a) as a result of unintentional mistake, instead of PT 16159 being inserted in the said sale and purchase agreement to describe the property sold, PT 16183 was inserted; PT 16183 having been already B sold to someone else. After the mistake was discovered PW1 was requested to rectify the mistake but the first plaintiff refused;

(b) that the balance of the purchase price was 'not received' by the first defendant as the first plaintiff was claiming PT 16183 instead of PT 16159 which was the shophouse purchased by him;

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(c) that the first plaintiff had no right to surrender his rights under the sale and purchase agreement to the second plaintiff without the permission of the defendants; and, the deed of assignment is void and bad in law.

After the plaintiffs had closed their case and whilst DW2 was being D subjected to some severe cross-examination, learned counsel for the defendants informed the court that the defendants were not disputing that PT 16183 was the lot sold to the first plaintiff in accordance with the law. This admission was reconfirmed during submissions when learned defence counsel stated that the defence of mistake was abandoned. With the above admission, the mainstay of the defence was gone; learned defence counsel E submitted however that there were still three other defences open to the defendants which would entitle them to defeat the claim of the plaintiffs. They were: (a) which of the plaintiffs had the right to sue in view of the assignment; (b) whether a claim is disclosed against the second defendant; and (c) there has been no tender of the balance of the purchase price by the F plaintiffs to entitle the plaintiffs to request performance from the defendants.

I now consider these defences and the evidence relating to each.

*The plaintiffs' right to sue*

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It is the contention of the defendants that if there has been an absolute assignment by the first plaintiff of his rights under the sale and purchase agreement to the second plaintiff, then the first plaintiff cannot sue; if he has not, then the second plaintiff cannot sue. It is counsel's submission that the rightful plaintiff is the second plaintiff but he does not give any reasons to H support this submission but has cited in support the cases of *Kredin Sdn Bhd v YTF Investments Sdn Bhd* [1998] 1 MLJ 46 at p 48 and *Rosita bte Amit v Tan Boon Seng* [1989] 3 MLJ 186.

The second plaintiff gave evidence through its director Datuk Cheong Kong Leong (PW4) who testified that notwithstanding the assignment, the I first plaintiff was authorized to bring and maintain this action and referred to two deeds of assignment signed between the first and second plaintiff; the first dated 4 September 1993 and the second a supplemental deed dated

12 October 1995. These are found at pp 318 to 324 of encl 55. When these deeds are read, they confirm the evidence of PW4. The supplemental deed also makes it clear that the assignment by the first plaintiff of his rights under the sale and purchase agreement is not an absolute one but is conditional upon the events stated therein which have not come to pass yet. In those circumstances, I find no merit in the submission of counsel that it is only the second plaintiff who is the proper plaintiff. In so far as the authorities relied on by counsel for the defendants is concerned, the facts of *Rosita bt Amit v Tan Boon Seng* are distinguishable. In that case, the defendant having assigned his property to the bank as security for a loan, resold the property to the plaintiff without the consent of the bank. When the plaintiff brought an action against the defendant for specific performance, the bank applied and was allowed by the court to be joined as a party to the suit and in so doing the learned judge observed that during the subsistence of the assignment in favour of the bank, the plaintiff could not sue the defendant for specific performance — all the rights title and interest of the defendant in the property having been assigned to the bank. Such a position does not attain in our case where it is the first and second plaintiffs who bring this suit to claim delivery of possession.

With regard to the reliance by the defendants on the case of *Kredin Sdn Bhd v YTF Investments Sdn Bhd* and in particular to the obiter opinion reported in the headnotes, again I would say that what was stated there has no application to our case because as already mentioned earlier, the supplemental deed of assignment allows for this action to be brought by the first plaintiff.

In so far as the pleaded defence on this point is concerned, namely, that the first plaintiff had no right to assign his rights under the sale and purchase agreement and that the deed of assignment is void; quite apart from the fact that there is no express prohibition against assignment in the sale and purchase agreement, the defendants have led no evidence in support of this defence and neither has counsel for the defendants made any submission on it. I accordingly find such defence not made out.

*Is a case disclosed against the second defendant?*

It is the submission of counsel for the defendants that the second defendant may have been the landowner but it was not the vendor of the said property. In so far as compliance with the terms of the sale and purchase agreement is concerned, counsel submitted that by delivering the title deed and memorandum of transfer to the first defendant whose obligation is to hand them over to the correct purchaser, the second defendant has fulfilled its obligations. As such submits counsel, there is no case disclosed against the second defendant. The answer to that submission lies in whether it accurately reflects the obligations of the second defendant under the sale and purchase agreement. The submission of counsel suggests that apart from the abovementioned obligation, the sale and purchase agreement imposes no other obligations on the second defendant. I find that this

submission lies in the face of cl 2 of the sale and purchase agreement which imposes an obligation on the first and second defendant not to subject the said land, ie PT 16183 to any encumbrance without the prior approval of the purchaser. In the same clause the first and second defendant undertook that the said property shall be free from encumbrances immediately prior to the handing over of vacant possession of the same to the purchaser. So, the question that must be asked is what constitutes an encumbrance for the purposes of this clauses The sale and purchase agreement itself does not define the word 'encumbrance'. However, in *Strouds Judicial Dictionary*, 3rd Ed Vol 2, included in the definition of 'Incumbrance' is the following description: 'A lease is an encumbrance if a vendor has contracted to give vacant possession'. Clause 2 of the sale and purchase agreement of course contains such a covenant, and, it has been pleaded by the plaintiffs in para 6 of the amended statement of claim that the defendants have in breach of the said agreement:

(a) failed to deliver vacant possession of the said property to the first plaintiff;

(b) wrongfully leased the said property to a third party without the consent of the first plaintiff.

In reply to this allegation, the first defendant in para 6(a) of their amended defence admitted that the said property had been leased out to a third party but maintain that the first defendant was entitled to do so. A proper reading of para 6 of the defence and especially sub-para (d) shows that that defence was pleaded on the basis that what was sold to the first plaintiff was not PT 16183 but PT 16159 and therefore the first defendant was entitled to lease out PT 16183 to a third party.

I find however that this defence is not maintainable because: firstly, once the defendants had abandoned the defence of mistake, this meant that from the very beginning there had never been a mistake about which shophouses had been sold to the first plaintiff; and secondly, I find that even if the defence of mistake had not been abandoned, there was overwhelming evidence adduced through PW1, and the first plaintiff and from the documents already referred to in evidence that there was no such mistake. Quite apart from the above, there is the uncontroverted evidence that it was the second defendant who entered into the two agreements with Pasaraya Matahari concerning PT 16183, knowing full well through Wang that PT 16183 had already been sold to the first plaintiff. In my judgment, a case had been more than made out against the second defendant; in fact the second defendant did not deny the allegation of breach contained in para 6 of the amended statement of claim. In not having done so, they must be taken to have admitted such breach.

*There has been no tender of the balance of the purchase price*

Learned counsel for the defendants adopted a two pronged argument here. It was firstly submitted that as the plaintiffs have not tendered the balance

of the purchase price to the first defendant, they have no right to enforce the sale and purchase agreement. In support learned defence counsel relied upon the case of *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287. It was next argued that even if there had been a valid tender, the plaintiffs are not entitled to any remedy as they have not prayed for specific performance of the agreement or at least the substance of it. According to counsel for the defendants, what the plaintiffs have prayed for is for possession of the said property, but submits counsel, possession is consonent with ownership and unless you obtain ownership, you cannot pray for possession; and to obtain ownership you have to pray for a transfer of the said property first, which the plaintiffs have not done.

I shall now consider each of these arguments.

Having looked at the defence carefully, I cannot find any averment in it raising the plea that there has not been a valid tender of the balance of the purchase price. It is of course a fundamental principle that a party is bound by its pleadings. Giving effect to that principle, I hold that it is not open to the defendants to avail themselves to this defence or to raise any submissions or argument on it. A second reason for not allowing this submission to be raised is because it is inconsistent with what is already pleaded. If para 3 of the amended defence is looked at, the first defendant openly says that it refused to accept the balance of the purchase price because the first plaintiff was claiming PT 16183 instead of PT 16159. Although the first defendant has not used the words 'refused to accept' in para 3 of its defence, they use the words 'not received' but anyone reading para 3 cannot but conclude that they mean the same thing. It is evident to me that notwithstanding the first defendant's play with words in their defence, the true purport of para 3 of the defence is that the first plaintiff's tender of the balance of the purchase price was not accepted by the first defendant for the ostensible reason that PT 16183 was being wrongfully claimed, a reason that no longer holds good. Being inconsistent with what the first defendant had admitted to in its pleadings by which it is bound, it would be wrong to allow the defendants to depart from the same.

I would also, with respect, reject the submission of no valid tender of the balance of the purchase price as being untenable in the circumstances of this case. This is a case in which the parties had entered into an agreement and their obligations to each other thereunder must be dictated by the terms thereof. Pursuant to the terms and conditions of the sale and purchase agreement and in particular cl 4 thereof, there is no obligation on the part of the first plaintiff to pay any part of the purchase price until he receives a notice requesting such payment accompanied by an architect's or engineer's certificate and no evidence was adduced by the defendants to show that such notice accompanied by the requisite certificates had been issued to the first plaintiff, so that an obligation to tender the balance of the purchase price on the part of the first plaintiff had arisen. What the evidence adduced does show is that it was the first plaintiff who was keen to pay the

balance of the purchase price, even though no obligation to do so had arisen under cl 4 of the sale and purchase agreement, and that two attempts to do so were made in 1994 before bringing action but each attempt was either rejected or ignored. In my judgment in having walked that extra mile when there was no obligation to do so, the plaintiffs have more than amply demonstrated their readiness and willingness to perform their obligations under the sale and purchase agreement. It is for the above reasons that I agree with the submission of counsel for the plaintiffs that the facts of our case are so clearly distinguishable from the facts in the case of *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* that the principles stated in that case have no application here. In *Ching Yik*'s case, the purchaser of the property had defaulted in the payment of the balance of the purchase price on its original due date. Subsequently, the purchaser tendered a cheque in payment of the balance of the purchase price outside the stipulated completion date and the tender of such payment was accepted by the vendor but the purchaser stopped payment of the cheque without a valid reason as a result of which the vendor refused to forward to the purchaser's solicitors the duly executed memorandum of transfer. The purchaser then brought an action for specific performance but it was struck out by the learned judicial commissioner; on appeal, it was held, inter alia, that the stipulation as to the payment of the purchase price was a fundamental term and that the purchaser's failure to pay the purchase price was fatal to his action. There has been no such failure in our case; as I indicated when setting out the facts earlier, I accept the testimony of the first plaintiff on why the first defendant refused to accept payment of the balance of the purchase price.

The defendants also rely on two other cases in support of their submission of no valid tender; the first is the case of *Lim Kim Swee v Tan Meng San* [1960] MLJ 262, but again a reading of that case shows that the facts of that case are clearly distinguishable from those in our case because in that case, the consideration for the sale of the property was distinctly divided into two parts; one part was the payment of some money to B Kaher Singh and the other part was the satisfaction of a debt owed to one Coelho who at that time was the chargee of the land. Without having paid the said Coelho, the purchaser brought an action for specific performance alleging that he was at all times willing and ready to perform his part of the agreement. It was held by the learned judge that the requirement to pay Coelho was a stipulation that required actual performance and not merely a willingness to perform on the part of the purchaser and as Coelho had not been paid prior to the commencement of the action, it must fail. On appeal, Thomson CJ upheld the decision of the learned judge and held that the purchaser had no cause of action until his part of the contract was performed. That is clearly not the position that prevails in our case. As I have already said earlier, no obligation had arisen under the terms of the sale and purchase agreement for the first plaintiff to pay the balance of the purchase price and therefore the question of actual performance on the part of the first plaintiff has not arisen in our case.

The second case relied upon by the defendants is the decision in Ipoh High Court Civil Suit No 22–152–94, in which the present first defendant was sued by another purchaser of a shophouse in Taman Sentosa for specific performance of a sale and purchase agreement but refused such relief by the learned judge on the grounds that there had not been a tender of the balance of the purchase price. A reading of that judgment shows that in arriving at his decision, the learned judge had relied on the decision in *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd.* However, as I have already pointed out, the facts of our case are clearly distinguishable from those in *Ching Yik*'s case and hence the principles there stated have no application in our case. It would also appear from the judgment in CS 22–152–92 that the issue of whether it was open to the defendant there to raise the plea of no tender or whether any obligation to pay the balance of the purchase price had even arisen, was not canvassed before the learned judge as now raised in this case. For the reasons given above, I must very respectfully decline to follow the decision in CS 22–152–92.

I now address the submission by learned defence counsel that because the plaintiffs have not prayed for specific performance, they are not entitled to claim delivery of possession of the said property.

To determine the correctness of this submission, it would be helpful to consider first the Rules of the High Court and then the nature of the equitable remedy of specific performance. Order 18 r 15(1) of the Rules of the High Court 1980 ('the RHC') reads:

> A statement of claim must state specifically the relief or remedy which the plaintiff claims, but costs need not be specifically claimed.

Pettit in *Equity and Law of Trusts* (4th Ed) p 448 describes specific performance as 'an Order of the Court directing a party to a contract to perform his obligations thereunder according to its terms'. Again, in *Equity Doctrines and Remedies* by Meagher, Gunmow & Lehane (2nd Ed) p 473, the learned authors in discussing the nature of the remedy of specific performance in executory and executed contracts state:

> An executory contract is one which requires the execution of an instrument, or the doing of an 'act in the law', which will put the parties in the position relative to each other which the contract contemplates. The typical example of an executory contract in this sense is an agreement to assure an interest in property. A contract to sell land, for instance, requires the execution of a conveyance or transfer; ...When a court directs a party to such a contract to perform his obligations thereunder according to its terms, that is a decree of specific performance. An executed contract is one which does not require the execution of an instrument or the doing of an act in the law, for the purpose of placing the parties in the position contemplated: the contract itself does so.

What emerges from a reading of O 18 r 15(1) of the RHC and the above passages is that in relation to an executory contract, the relief of specific performance is obtained by getting the court to order or direct a party to such contract to perform specific acts which he is obliged under the terms

of the contract to do and it would not, in my opinion, be fatal to a claim for such relief that it is not heralded by the expression 'specific performance'; what is required is that the party claiming the relief firstly identifies for the court what it is that he requires the other party to do so as to put him in a position relative to the other which the contract contemplates and secondly, he sets out in his pleadings the facts that entitle him to such relief. The pleadings in this case show that the plaintiffs have done both.

Reverting to the facts of our case, the sale and purchase agreement is clearly an executory contract which requires the doing of several acts by the first defendant, one of which is the delivery of vacant possession to the first plaintiff. Bearing in mind that PW1 had already been given custody of the title deed to PT 16183 when the sale and purchase agreement was entered into, the following facts set out in the statement of claim make it plain why the plaintiffs only seek an order for possession: (a) the first plaintiff is already in possession of a duly signed and adjudicated memorandum of transfer of the said property (para 4); (b) the construction of the shophouse has been completed (para 5); (c) the plaintiffs are ready and willing to perform their obligations under the said agreement (para 7); (d) by para 8 thereof, the only act the plaintiffs require the defendants to do is to deliver vacant possession of the said property. In my judgment, on the particular facts of this case, the plaintiffs' prayer for delivery of possession being supported by facts pleaded in the statement of claim is sufficient to secure for the plaintiffs the relief they seek.

As regards the submission that the plaintiffs cannot claim possession without first praying for a transfer of the said property, I regret that I find no merit in this submission because it ignores the fact that the plaintiffs are already in a position to put themselves on the register as owner, being in possession of the title deed and duly executed memorandum of transfer to the said property and therefore do not need to pray for a transfer as now suggested by counsel.

It was lastly submitted by learned counsel for the defendants that the claim for delivery of possession is premature because specific performance is not an automatic remedy but one only of the remedies available at the discretion of the court. Learned defence counsel went on to submit that before the court orders specific performance, it should consider four matters, namely, balance of convenience, hardship, readiness and ability of the plaintiff to perform his contract and whether damages are an adequate remedy. Counsel for the defendants however did not go further and refer to any evidence or make any submission on these four matters apart from saying that the first defendant is prepared to pay damages. I find that this submission of counsel must be viewed against the provisions of s 11(2) of the Specific Relief Act 1950 ('the Act') which reads:

> Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

On his part, learned counsel for the plaintiffs referred to the *Sale and Purchase of Real Property in Malaysia* by Dr Visu Sinnadurai where at p 419, the learned author had this to say with regard to s 11(2) of the Act:

> Section 11(2) of the Specific Relief Act makes statutory provision for the equitable rule that until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by damages or compensation in money. Therefore, in cases where specific performance is sought, there is a presumption that damages would not be adequate and the contract should be specifically enforced. The burden of rebutting this presumption is on the defendant.

I respectfully agree with that passage. Reverting to the facts of this case, I am satisfied that the conditions required for the presumption under s 11(2) of the Act to come into play are present here, namely, a contract for the sale of immovable property and the breach thereof. In addition thereto, there is no allegation or evidence that the conduct of the plaintiffs have been such as to disentitle them to the equitable relief they seek. The next question then is, have the defendants rebutted the presumption? I find that all that the defendants have done to rebut the presumption under s 11(2) of the Act is to make submissions on principles of law, which in my view is insufficient to discharge the burden which the law has placed on them. In any event, I am quite satisfied from the facts already known to the court, namely that there was no mistake in the identity of the property sold; that the first defendant knowingly refused to accept the balance of the purchase price; that despite their contractual obligation to deliver vacant possession of the said shophouse yet letting out the same, all go to show that the balance of convenience and hardship do not favour the exercise of discretion in favour of the defendants.

I am accordingly satisfied that the plaintiffs have on a balance of probabilities proved their claim against the defendants and that the plaintiffs are entitled to an order that the defendants do deliver vacant possession of the said property to the plaintiffs. Before turning to the question of damages, I wish to say that with regard to the defence case, the defendants called two witnesses to testify. Unfortunately both these witnesses admitted that they had no personal knowledge of the sale of the said property to the first plaintiff and what evidence they did give was of no or very little relevance to the matters on which counsel for the defendants rested his submissions on. Consequently I could give their evidence very little if any weight at all.

*Damages*

There is finally the question of damages. Although the statement of claim requires that damages be assessed, counsel for the plaintiffs indicated that he would deal with and adduce evidence regarding damages during the trial and to that extent indicated that the plaintiffs were not only seeking agreed and liquidated damages but also exemplary damages as well. I will therefore

consider the question of damages in this judgment rather than have it assessed before a registrar.

First, agreed and liquidated damages. In submission, counsel for the defendants agreed that liquidated damages were payable but that if the plaintiffs receive such damages they cannot receive other damages and certainly not exemplary damages when it has not been pleaded. In view of the above concession and the fact that counsel for the defendants made no submission on the matter, it must be taken that the first defendant regards the sum payable in accordance with cl 20 of the sale and purchase agreement as the amount of reasonable compensation payable to the first plaintiff for breach of their obligation to deliver vacant possession. The first plaintiff in evidence stated that pursuant to cl 20, the first defendant agreed to pay liquidated damages calculated from day to day at the rate of 10% pa of the purchase price which works out to RM35.06 per day. I accordingly order that the first defendant do pay the first plaintiff liquidated damages at the rate of RM35.06 commencing from 14 August 1994 till today which works out to RM68,331.94. In view of my above award, there will be no necessity to consider whether counsel for the plaintiff's submission on whether the provision of the Housing Developers (Control and Licensing) Act 1966 and Regulation made thereunder apply to the sale and purchase agreement herein.

*Set-off*

Counsel for the plaintiff submitted that instead of the first plaintiff having to pay the first defendant the balance of the purchase price amounting to RM70,400, the court should allow the first defendant to set-off the liquidated damages against the balance of the purchase price. In support counsel referred to the case of *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31. That was a case in which the respondent had purchased a shophouse from the appellant developer who was to complete and deliver possession thereof within 18 months of the sale agreement but did not do so until some 23 months after the due date. The sale agreement contained a stipulation for payment of liquidated damages for delay of completion. When the shophouse was completed and the appellant requested for payment of the balance of the purchase price amounting to RM17,907.20, the respondent maintained that the amount due to her as liquidated damages amounted to some RM27,826.66 and therefore she was entitled to set-off her cross claim against the amount due to the appellant whereafter the appellant should pay her the balance of RM9,919.46 and hand over possession and the keys to the shophouse. When the appellant refused to do so, the respondent brought an action claiming, inter alia, the sum of RM9,919.46 (ie after set-off), delivery of possession of the shophouse and its keys and delivery of the documents of title. The respondent was granted such relief by the High Court. On appeal one of the issues raised was whether in withholding payment of the last installment due, did the respondent commit breach of the sale agreement, ie whether

the respondent could set-off the liquidated damages payable to her against the last payment. In holding that the respondent did not commit any breach of the agreement, Suffian LP in delivering the judgment of the Supreme Court said at p 34:

> The plaintiff's cross-claim and the defendant's claim arise out of the same transaction and are closely connected with each other. The plaintiff's cross claim is so closely connected with the defendant's demand that it would be manifestly unjust to allow the defendant to enforce payment without taking into account the plaintiff's cross-claim.

I do appreciate that the facts in *SEA Housing* and the facts here are distinguishable in that no demand has been made by the defendants in our case for the balance of the purchase price but it is the ratio in the above quoted passage that I believe is applicable to our case, in that the first plaintiff's right to liquidated damages is a cross-claim which arises out of the same transaction as the first defendant's right to be paid the balance of the purchase price and is so closely connected with it that it would be manifestly unjust if I were to order that the first plaintiff should pay over to the first defendant the sum of RM70,400 without taking into account the amount of liquidated damages due to the first plaintiff. In the circumstances, I allow the first plaintiff to set-off the sum of RM68,331.94 from the sum of RM70,400 still payable to the first defendant.

*Exemplary damages*

As regards the plaintiffs' claim for exemplary damages, it is the submission of counsel for the defendants that as the plaintiffs did not expressly plead their claim for exemplary damages, it cannot be awarded. Counsel for the plaintiffs on the other hand submitted that there is no need to expressly plead a claim for exemplary damages and that following the decision of *Rookes v Barnard* [1964] AC 1129, exemplary damages are awarded in three categories of cases: (a) where there is oppressive, arbitrary or unconstitutional action by a government servant; (b) if the conduct of the defendant is calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiffs; and (c) where exemplary damages are authorised by statute. It is the submission of counsel for the plaintiff that the defendants in knowingly and wilfully attempting to lease out the said property first to Pasaraya Matahari and more recently to a car dealer have conducted themselves in such an outrageous and unscrupulous manner that the court should punish the defendants by an award of exemplary damage against them to vindicate the strength of the law since the act of the defendants was so clearly calculated to make a profit for themselves by delaying delivery of possession to the plaintiffs.

The position in Malaysia appears to be that a party claiming exemplary damages need not expressly plead it, unlike the position in England where following the recommendations of Lord Hailsham LC in the case of *Broome v Cassell & Co Ltd & Anor* [1972] AC 1027, the Rules of the Supreme

A Court were amended so that by O 18 r 8(3) it is now a requirement that a claim for exemplary damages must be specifically pleaded together with the facts on which the plaintiff relies. In my view, notwithstanding our present position, a party claiming exemplary damages is not relieved from complying with the other principles of pleadings, namely that a defendant is to know from the earliest possible moment what is alleged against him; B what case he has to meet and what relief is sought against him, so that in an appropriate case justice may require that exemplary damages be refused if it has not been pleaded as was the case in *Foong Chee Chong v Inspector Mohd Nasir bin Shamsuddin & Anor* [1998] 6 MLJ 421.

C Having stated the above, I find that a decision on whether or not exemplary damages should be awarded to the plaintiffs will not turn on whether the plaintiffs have expressly pleaded it or not; rather it will turn on whether exemplary damages are available in a case pleaded in contract only where there is no allegation that the defendants have committed a tort against the plaintiffs.

D *McGregor on Damages* (16th Ed) in para 431 traces the historical justification for exemplary damages and states:

> In the 1760's exemplary damages first made their appearance on the English legal scene. The earliest cases arose in the cause celebre of John Wilkes and E the *North Briton*. In the government's effort to stop the *North Briton* from being published, a variety of individuals suffered interference at the hands of public officials and in two tort actions of 1763 based upon such interference, *Huckle v Money* and *Wilkes v Wood*, awards of exemplary damages were made. By the end of the decade further awards had appeared in other contexts, and thereafter exemplary damages became a familiar feature of *tort though never contract law*, being awarded not only in cases of assault, false imprisonment, F defamation, seduction and malicious prosecution but also in cases of trespass to land and, eventually, trespass to goods. (Emphasis added.)

The law regarding the award of exemplary damages took a drastic change in the 1960s when in the case of *Rookes v Barnard*, the House of Lords took the opportunity to review the whole doctrine and held that the award of G exemplary damages should be made only in the three categories of case I have already referred to earlier in these judgement.

McGregor then goes on to state the present position in para 440 in these words:

H > Exemplary awards are therefore now to be confined basically to the torts of trespass, whether to the person or to property, defamation and false imprisonment; private nuisance is probably included but not, curiously, malicious prosecution ... .

McGregor then goes on to discuss the further restriction made on the award I of exemplary damages for the tort of deceit and torts involving discrimination by the case of *AB v South West Water Services* [1993] QB 507 (CA), and continues at para 443 to state:

> In addition to these two exclusions from the exemplary damages net, it is clear that awards of exemplary damages will not be available in negligence, however gross, or public nuisance - *AB v South West Water Services* so decides-or in conversion, *and certainly not for breach of contract where the writ of exemplary damages has never been allowed to run.* (Emphasis added.)

Thus whilst from the beginning until today, exemplary damages have been awarded in cases founded in tort, it has not been awarded for breach of contract. Reverting now to the question at hand, the first plaintiff's claim is pleaded in contract and in essence the relief he seeks is the specific performance of that agreement with an additional claim for damages for breach of that agreement. It is not a claim founded in tort and counsel in claiming exemplary damages has not alleged any tortious act committed against the plaintiffs and in not having done so I doubt punative or exemplary damages can be properly awarded in this case: See *Kenny v Preen* [1963] 1 QD 499. Counsel for the plaintiffs did in submission say that the leasing out of the said property had caused inconvenience, annoyance and uncertainty to the plaintiffs but none of the plaintiffs' witnesses gave any evidence to this effect. Accordingly, besides being unsupported by any evidence the submission of counsel also did not identify what tort had been committed by the defendants and therefore could not be acted on at all. It is therefore my finding that the plaintiffs' claim for exemplary damages fails. In so finding I do not wish to be seen as saying that in a contractual situation, a claim for exemplary damages will not lie; it may well do and the case of *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 204 is a good example of a case in which the plaintiffs' case was pleaded in contract and tort but their claim for exemplary damages was based on allegations of tortious wrongs committed against their property.

In conclusion there will be judgment for the plaintiffs in the following terms:

(a) that the defendants do deliver vacant possession of the said property to the plaintiffs;

(b) that the first defendant do pay to the plaintiffs the sum of RM68,331.94 as agreed and liquidated damages from 14 August 1994 till today together with interest thereon at 8% per annum from today till date of realisation;

(c) that until possession is so delivered the first defendant do pay to the plaintiffs the sum of RM35.06 a day from the date hereof together with interest thereon at 8% per annum;

(d) that the plaintiffs are entitled to set-off so much of the sum of RM68,331.94 and any further sum representing agreed and liquidated damages together with interest thereon against the sum of RM70,400 payable to the first defendant as the balance of the purchase price for the said property, as will satisfy the same and if any sum still remains due to the first defendant thereafter to pay the same upon delivery of possession of the said property;

A (e) Costs to the plaintiffs.

*Order accordingly.*

Reported by Jafisah Jaafar

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